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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/694,960	10/28/2003	Isabelle Laye	1410/79708	4443

22242 7590 06/02/2008

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EXAMINER	
WONG, LESLIE A	

ART UNIT	PAPER NUMBER
1794	

MAIL DATE	DELIVERY MODE
06/02/2008	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No.	Applicant(s)	
	10/694,960	LAYE ET AL.	
	Examiner	Art Unit	
	Leslie Wong	1794	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE *3* MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *15 May 2008*.

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-7 and 27-42* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-7 and 27-42* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on May 15, 2008 has been entered.

The following is a quotation of the first paragraph of 35 U.S.C. 112:

> The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

Claims 1-4, 27-34, and 38-42 are rejected under 35 U.S.C. 112, first paragraph, as based on a disclosure which is not enabling. An emulsifier critical or essential to the practice of the invention, but not included in the claim(s) is not enabled by the disclosure. See *In re Mayhew*, 527 F.2d 1229, 188 USPQ 356 (CCPA 1976). The melting point appears to be dependent upon the use of an emulsifier but an emulsifier is not claimed. All of Applicant's examples depend on the use of an emulsifier wherein both the claimed firmness and melting point are dependent on the presence of an emulsifier.

Claims 1-7 and 27-42 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the enablement requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to enable one skilled in

the art to which it pertains, or with which it is most nearly connected, to make and/or use the invention.

Applicant does not clearly teach or define whether the claimed temperatures are softening temperatures or melting temperatures, nor does Applicant distinguish between the two temperatures.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claims 1-7 and 27-42 are rejected under 35 U.S.C. 103(a) as being unpatentable over Gupta et al (Lait (1993) **73**, 381-388).

Gupta et al disclose a cheese comprising the addition of whey protein concentrate and an emulsifier, wherein the emulsifier serves to improve the firmness (see entire document, especially Figure 1). It is further noted that the addition of whey protein concentrate to cheese serves to increase the whey in the casein-to-whey ratio.

It would have been obvious to a person of ordinary skill in the art, at the time the invention was made, to adjust the whey to casein ratio as taught by Gupta et al and as is claimed because the manipulation of the casein to whey ratio is well-known in the art. In the absence of a showing to the contrary Applicant is using known components to obtain no more than expected results.

Claims 1-7 and 27-42 are rejected under 35 U.S.C. 103(a) as being unpatentable over Yee et al (US Patent No. 5750177) for the reasons set forth in rejecting the claims in the last office action.

Yee et al disclose a cheese containing added whey having a melting temperature of less than 200ºF (see entire document, especially claims 10 and 12). Although not the preferred embodiment, Yee discloses emulsifying agents (see column 4, lines 46-51 and column 7, lines 16-26).

The claims differ as to the specific ratio of casein to whey.

Yee et al also teach the adjustment of the casein to whey ratio and specifically teach a ratio of at least 1:4 (whey to casein).

It would have been obvious to a person of ordinary skill in the art, at the time the invention was made, to adjust the whey to casein ratio as taught by Yee et al and as is claimed because the manipulation of the casein to whey ratio is well-known in the art. In the absence of a showing to the contrary Applicant is using known components to obtain no more than expected results.

Yee et al clearly teach the adjustment of the whey to casein ratio (including 1:16, 1:8, and 1:4) and Yee et al specifically teaches making a cheese with a higher level of whey proteins than in conventional cheese (see column 5, lines 14-45).

Applicant's arguments filed May 15, 2008 have been fully considered but they are not persuasive.

Applicant argues that Yee et al do not teach the claimed whey to casein ratio and that the claimed ratios provide for unexpected results.

The rejection is applied under 35 U.S.C. 103(a). As stated above, the claims differ from Yee et al as to the specific ratio of casein to whey. Yee et al teach the adjustment of whey to casein ratio and a cheese with a higher level of whey proteins than in conventional cheese. In response to applicant's argument that there is no suggestion to modify the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. In this case, Yee et al teach a modification of the protein ratios. In the absence of a showing of unexpected results, applicant is using known components to obtain no more than expected results.

The declaration under 37 CFR 1.132 filed May 15, 2008 is insufficient to overcome the rejection of claims 1-7 and 27-42 based upon Yee et al as set forth in the last Office action for the following reasons.

The showing does not appear to be commensurate in scope with the broadest claim (i.e. claim 1). Section 12 of the declaration refers to the melting points for the claimed cheese at a casein-to-whey ratio of 3:1 yet does not explain from where these melting points are obtained. It appears that melting points from the specification include the presence of an emulsifier yet claim 1 does not require the presence of an emulsifier.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Leslie Wong whose telephone number is 571-272-1411. The examiner can normally be reached on Tuesday-Friday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Leslie Wong/
Primary Examiner, Art Unit 1794

LAW
May 26, 2008